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14TH MEETING OF THE CDDH AD HOC NEGOTIATION GROUP ON THE ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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Proposal by the EU Delegation on "Requests for an advisory opinion pursuant to Protocol No. 16"

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Strasbourg, Tuesday 5 July 2022 (10:00 am) – Thursday 7 July 2022 (4:30 pm)

(The meeting will be held as a hybrid meeting through the KUDO videoconferencing system and Room 9 of the Palais de l'Europe)

Council of Europe

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I. Introduction:

1. Article 1 of Protocol No. 16 provides that a highest court or tribunal of a High Contracting Party may, in the context of a case pending before it, request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto. The Protocol has been ratified by 16 High Contracting Parties, including 9 EU member States (Estonia, Finland, France, Greece, Lithuania, Luxembourg, the Netherlands, the Slovak Republic, Slovenia).

2. In principle, EU law does not limit the ability of a highest court or tribunal of an EU member State to request advisory opinions from the Court in accordance with Protocol No. 16. However, where national courts in the EU must resolve a matter that concerns the interpretation or application of EU law, account must be taken of the fact that national courts are an integral part of the EU system of legal remedies and that the Court of Justice is the highest court in that system.

3. Central to the relationship between national courts and the Court of Justice – and to the functioning of the EU legal system as a whole – is the preliminary reference procedure. Article 267 of the Treaty on the Functioning of the European Union provides that any court or tribunal of an EU member State may, if it considers that a decision on the question is necessary to enable it to give judgment, ask the Court of Justice of the EU to give a preliminary ruling concerning the interpretation of the EU Treaties or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the EU. Moreover, where such a question is raised in a case pending before a court or tribunal against whose decisions there is no judicial remedy under national law, that court or tribunal is required to bring the matter before the Court of Justice.

4. A question concerning the interpretation of the EU Treaties, or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the EU may coincide with a question of principle relating to the interpretation or application of rights and freedoms guaranteed by the Convention or the protocols thereto. This is because EU law imposes – on EU institutions, bodies, offices and agencies and on EU member States when they implement EU law – a requirement to respect fundamental rights, in particular those recognised by the Charter of Fundamental Rights of the European Union (*ECJ Case C-234/17 XC and others, EU:C:2018:853*). Moreover, fundamental rights as guaranteed by the Convention constitute general principles of the EU law (*Article 6(3) TEU*). In so far as the Charter contains rights which correspond to rights guaranteed by the Convention, Article 52(3) of the Charter provides that their meaning and scope are to be the same as those laid down by that Convention (*ECJ Case C-117/20 Bpost, EU:C:2022:202, paragraph 23*). As a result, the interpretation or application, in the context of proceedings before a highest national court or tribunal, of the EU Treaties or of an act of the EU institutions, bodies, offices or agencies or of a national measure that implements EU law may give rise to a question of principle relating to the interpretation or application of rights and freedoms guaranteed by the Convention or the protocols thereto.

5. In those circumstances, "Protocol No. 16 permits the highest courts and tribunals of the member States [that have ratified the Protocol] to request the EctHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms guaranteed by the [Convention] or the protocols thereto, even though EU law requires those same courts or tribunals to submit a request to that end to the Court of Justice for a preliminary ruling under Article 267 TFEU' (*Opinion 2/13, EU:2014:2454, paragraph 196*). This is liable to adversely affect the autonomy and effectiveness of the preliminary ruling

procedure provided for in Article 267 TFEU. For the EU to be able to conclude the accession agreement, that agreement must make provision in respect of the relationship between the preliminary ruling procedure and the mechanism established by Protocol No. 16 (Opinion 2/13, EU:2014:2454, paragraph 199).

6. To address this issue, the EU proposes a clause that would specify that, where a court or tribunal of a member State of the European Union, in the context of a case pending before it, encounters a question relating to the interpretation or application of rights guaranteed by the Convention or the protocols thereto, that court or tribunal shall not be considered as a highest court or tribunal of a High Contracting Party for the purposes of Article 1, paragraph 1, of Protocol No. 16 to the Convention if the question falls within the field of application of European Union law.

7. Such a clause – specifying the application of Protocol No. 16 in relation to the internal legal order of the Union – would avoid amending the Protocol, thereby maintaining its readability. It would, in effect, make provision for the relationship between the preliminary ruling procedure and the mechanism established by Protocol No. 16 while respecting the wording, the logic and the functioning of the latter. It would address the concern expressed in Opinion 2/13 in relation to Protocol No. 16 without affecting the prerogative of designated highest courts and tribunals of the EU member States that have ratified the Protocol to seek advisory opinions from the European Court of Human Rights on any question that falls outside the field of application of EU law.[1]

8. Moreover, the proposed clause would preserve the nature of the mechanism established under Protocol No. 16 as a dialogue between, on the one hand, the requesting court and, on the other, the European Court of Human Rights. In line with the wish expressed by various delegations during the 13th negotiating meeting, there would not be an additional mechanism for assessing whether the case from which the request arises involves EU law. Instead, the requesting court and the European Court of Human Rights will each have a responsibility to make certain that the mechanism established under Protocol No 16 is not used to obtain advisory opinions in circumstances where EU law, as interpreted by the Court of Justice, requires the requesting court to refer the question to the Court of Justice for a preliminary ruling under Article 267 TFEU. Of course, the final decision in the proceedings in which the Court of Justice has given a preliminary ruling would still be subject to review by the European Court of Human Rights should there be an individual application under Article 34 of the Convention.

9. Finally, the proposed clause would be without prejudice to the possibility for the Union to become a High Contracting Party to the Protocol. In fact, by clarifying how the notion of 'highest courts and tribunals' is to be applied in the specific context of the EU judicial system, the clause would, in the event of EU-accession to the Protocol, avoid a proliferation of requests

[1] For the avoidance of doubt: many national measures are unrelated to EU law. Fundamental rights guaranteed in the legal order of the EU are applicable in all situations governed by EU law, but not outside such situations (ECJ Case C-617/10 Åkerberg Fransson, EU:C:2013:105, paragraph 19; ECJ Case C-235/17 Commission v Hungary, EU:C:2019:432, paragraphs 63-65; ECJ Joined Cases C-609/17 and C-610/17 TSN, EU:C:2019:981, paragraphs 43 and 53; ECJ Case C-467/19 PPU QR, EU:C:2019:776, paragraphs 37-43). The Court of Justice has no jurisdiction to examine the compatibility with fundamental rights of national measures lying outside the scope of EU law (e.g. ECJ Case C-483/12 Pelckmans Turnhout, EU:C:2014:304). As a result, the risk of confluence between the advisory opinion mechanism established under Protocol No 16 and the preliminary reference procedure under Article 267 TFEU does not arise, because national courts – including those against whose decisions there is no judicial remedy under national law – are not required to have recourse to the preliminary reference procedure (e.g. ECtHR, 8 July 2008, Vajnai v. Hungary, Application no. 33629/06). Instead, national measures lying outside the scope of EU law are to be examined by national courts in the light of the relevant national constitution and the Convention, and subject to the subsidiary jurisdiction of the European Court of Human Rights. This will remain the situation after EU accession to the Convention (Article 6(2) TEU and Article 2 of Protocol No 8 EU).

and identify the appropriate level at which the dialogue should take place (see, in this connection, paragraph 8 of the Explanatory Report to Protocol No. 16).

10. In sum, the proposed clause would ensure that the EU judicial system, composed of the courts of the member States and the EU judicature, is properly integrated in the advisory opinion mechanism established by Protocol No. 16. The clause would not affect courts or tribunals outside the EU.

II. Proposal by the EU Delegation on "Requests for an advisory opinion pursuant to Protocol No. 16":

The EU proposes the following addition to Article 1 of the draft Accession Agreement of 2013 in connection with Issue 2 of Basket 2 (Requests for advisory opinions under Protocol No. 16 to the Convention). This proposal replaces, insofar as it concerns requests for an advisory opinion under Protocol No. 16, the EU's initial proposal of November 2020 for a new Article 4a. However, the EU maintains its proposal to clarify, in paragraph 66 of the Explanatory Report, that the prior involvement procedure does not apply in a procedure before the Court that has been initiated by a request for an advisory opinion made in accordance with Protocol No. 16 to the Convention. The EU reserves the right to amend, supplement or withdraw proposals.

Article 1 (new paragraph)

Where a court or tribunal of a member State of the European Union, in the context of a case pending before it, encounters a question relating to the interpretation or application of rights guaranteed by the Convention or the protocols thereto, that court or tribunal shall not be considered as a highest court or tribunal of a High Contracting Party for the purposes of Article 1, paragraph 1, of Protocol No. 16 to the Convention if the question falls within the field of application of European Union law.

Explanatory report (new paragraph)

Article 1, paragraph [x], reconciles the EU judicial system, composed of the courts of the EU member States and the EU judicature, with the advisory opinion mechanism established by Protocol No. 16. The effect of this clause is to preclude recourse to the advisory opinion procedure before the Court where EU law, as interpreted by the CJEU, requires a court or tribunal to instead submit a request to the CJEU for a preliminary ruling under Article 267 of the TFEU. The final decision in the proceedings in which the CJEU has given a preliminary ruling would still be subject to review by the Court should there be an individual application under Article 34 of the Convention. Article 1, paragraph [x] does not affect the prerogative of designated highest courts and tribunals of the EU member States that have ratified the Protocol to seek advisory opinions from the Court on any question that falls outside the field of application of EU law.